

1 John J. Hebert (#010633)  
2 Mark W. Roth (#010708)  
3 Philip R. Rudd (#014026)  
**POLSINELLI SHUGHART PC**  
4 CityScape Plaza  
One E. Washington Street, Suite 1200  
Phoenix, AZ 85004  
Telephone: (602) 650-2000  
Facsimile: (602) 264-7033  
Email: [PhoenixBankruptcyECF@polsinelli.com](mailto:PhoenixBankruptcyECF@polsinelli.com)  
Email: [jhebert@polsinelli.com](mailto:jhebert@polsinelli.com)  
Email: [mroth@polsinelli.com](mailto:mroth@polsinelli.com)  
Email: [prudd@polsinelli.com](mailto:prudd@polsinelli.com)  
Email: [mmartin@polsinelli.com](mailto:mmartin@polsinelli.com)  
8 Attorneys for Debtors

9 **IN THE UNITED STATES BANKRUPTCY COURT**

10 **THE DISTRICT OF ARIZONA**

11 In re: Chapter 11 Proceedings  
12 94<sup>TH</sup> AND SHEA, LLC, Case No. 2:10-bk-37387-SSC  
13 Debtor.  
14

**EMERGENCY MOTION FOR  
AUTHORIZATION TO USE CASH  
COLLATERAL**

15 94<sup>TH</sup> AND SHEA, LLC, the debtor and debtor-in-possession herein (“Debtor”), by and  
16 through undersigned counsel, pursuant to 11 U.S.C. §363(c) and Rules 4001(b) and 9014, Federal  
17 Rules of Bankruptcy Procedure, hereby requests that the Court enter its order authorizing the  
18 Debtor to use rents and other income generated by the Debtor’s property to pay for the Debtor’s  
19 ordinary and necessary operating and reorganization expenses as set forth in the proposed budget  
20 attached hereto as Exhibit “A” (the “Budget”). Additionally, the Debtor requests that the Court  
21 enter an order that permits the Debtor to use insurance proceeds it will be receiving within the next  
22 30 days to make the necessary repairs of roof damage that was caused by a recent hail storm. The  
23 Debtor requests that the court enter an order compelling the Debtor’s secured creditor to endorse  
24 the insurance check over to the Debtor to allow the Debtor to pay for the necessary repairs. In  
25 support of this “Motion for Authorization to Use Cash Collateral” (“Cash Collateral Motion”), the  
26 Debtor states as follows:  
27  
28

## **JURISDICTION AND VENUE**

This Court has jurisdiction over this case pursuant to 28 U.S.C. §1334. The subject matter of this motion is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (M). Venue is proper under 28 U.S.C. § 1408.

## **FACTUAL BACKGROUND**

1. The Debtor is an Arizona limited liability company authorized to do and doing business in the State of Arizona.

2. The Debtor filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code, on November 19, 2010 (the “Petition Date”).

3. The Debtor is operating its business and managing its assets as a debtor-in-possession in accordance with 11 U.S.C. §§ 1107 and 1108.<sup>1</sup>

4. The Debtor owns and operates that certain real property known as The Shops And Office at 9400 Shea, located at 9325, 9343, 9375, and 9397 East Shea Boulevard in Scottsdale, Arizona (the “Property”). The Property consists of 37,037 square feet of retail space and 35,238 square feet of office space. The retail space has 23,238 square feet occupied. The office space has 35,238 square feet occupied. The total occupancy for both office and retail is 81%.

5. The Property is managed by Nobeus Property Management, Inc. an Arizona Corporation who has been in business for over 20 years and has operated as a court appointed receiver in the past. They are a well-respected, manager of commercial real properties throughout the Valley.

6. JPMCC 2007-CIBC19 Shea Boulevard, LLC (“Lender”), has asserted a claim against the Debtor, allegedly secured by the Property, in the amount of approximately \$21 million.

7. Lender has noticed a trustee's sale with respect to the Property for January 6, 2011. Despite the Debtor's best efforts to negotiate a resolution of Lender's asserted claims against the Debtor, the Debtor was unable to reach an agreement with Lender and filed its voluntary petition for relief on the Petition Date in order to reorganize and restructure its debts and liabilities for the

<sup>1</sup> Unless otherwise indicated, all references to code sections herein shall be to the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*

1 benefit of all parties-in-interest.

2       8. In order to continue operating and maintaining the Property during the pendency of  
3 this Chapter 11 case for the benefit of all creditors and parties-in-interest, it is necessary for the  
4 Debtor to use the rental and other income from the Property to pay for the ordinary and necessary  
5 operating and reorganization expenses of the Property and the Debtor.

6       9. The Debtor's projected income and expenses for the next seventy two (72) days (*i.e.*,  
7 through January 2011) are identified in the Budget that is attached hereto as Exhibit "A."

8       10. As reflected in the Budget, the Debtor's income includes base rental income from  
9 tenants of the Property and common area maintenance reimbursement income (collectively, the  
10 "Income").

11       11. Also as reflected in the Budget, the Debtor's expenses include utility expenses,  
12 maintenance and repair expenses, janitorial expenses, ordinary and customary property  
13 management fees (collectively, the "Expenses").

14       12. Upon information and belief, Lender asserts a lien in the rental and other income  
15 generated by the Property, and that such income constitutes its "cash collateral" as defined in 11  
16 U.S.C. §363. The Debtor has not had sufficient time to determine the validity, priority,  
17 enforceability, and/or extent of Lender's asserted lien. Accordingly, the Debtor reserves all rights  
18 with respect thereto.

19       13. The Debtor proposes to use the Income to pay the Expenses in accordance with the  
20 Budget, with a ten percent (10%) variance of the total Budget.

21       14. It is crucial for the Debtor to have the use of the Income to operate, maintain and  
22 preserve the Property in order to, among other things, (a) maintain tenant relations and comply with  
23 its obligations as a landlord to the Property's tenants, (b) continue marketing the Property to  
24 prospective tenants in order to improve the Property's cash flow, and (c) preserve the going  
25 concern value of the Property while the Debtor formulates and implements a plan of reorganization.

26       15. The Debtor believes that its business operations and reorganization efforts will  
27 suffer immediate and irreparable harm if it is not allowed to use the Income to pay the Expenses.  
28 Indeed, the value of the Property will decline if the Expenses are not paid.

16. To the extent that the Property generates Income in excess of the Expenses, as the Budget reflects, the Debtor will hold and sequester such excess Income, subject to whatever rights Lender has in the Income pursuant to its lien.

17. Lastly, on October 5, 2010, the Debtor's flat roofs were severely damaged by a hail storm. Most of the Debtor's HVAC systems had significant coil damage. The tops of parapet walls were seriously damaged and crushed by hail as well as all architectural popouts and the south space of all vertical walls . As a result of the damage the Debtor obtained bids to repair the damage and filed a claim with its property insurer, Farmers Insurance Company. The bids obtained by the debtor for the repairs were as follows:

\$59,350.00 for roof repair.

\$72,493.61 for HVAC repair

\$59,973.00 for EIFS Repair

## Bid Pending on Metal Roof/Canopies Repair

18. The Debtor is expecting a check from the insurance company which will be a joint check made out to the Debtor and the Lender. The Debtor requests an order that compels the Lender to endorse the check over to the Debtor, and permission for the Debtor to use the insurance proceeds, to make the necessary repairs in accordance with the bids obtained by the Debtor.

## **LEGAL ANALYSIS**

Pursuant to 11 U.S.C. §363(c)(2), the Debtor may use cash collateral if the entity holding an interest in such cash collateral consents or, if after notice and a hearing, the Court authorizes its use. Where an entity objects to the use of cash collateral, the Court still may permit its use by the Debtor upon a showing that the rights of the objecting party are adequately protected. 11 U.S.C. §363(e); See Collier on Bankruptcy §363.04, 15th Ed., 1989.

Section 361 of the Bankruptcy Code specifies three means of proving adequate protection; however, as indicated in the legislative history to that section, such means are “neither exclusive nor exhaustive.” Generally, the “interest in property sought to be protected under Code § 361 is the value of the secured creditor’s collateral during the interim period between the filing of the petition

1 and confirmation of a plan of reorganization, or dismissal of the case.” *In re 499 W. Warren Street*  
2 *Associates, Ltd. Partnership*, 142 B.R. 53, 57 (Bankr. N.D.N.Y. 1992) (citation omitted).

3 Thus, courts have consistently found that a debtor’s use of cash collateral to pay the  
4 reasonable and necessary operating expenses of the debtor’s property, by itself, satisfies the  
5 “adequate protection” requirement of § 363(c)(2). *See e.g. In re R&G Properties, Inc.*, 2009 WL  
6 2043875 at \*6 (Bankr. D. Vermont 2009) (and cases cited therein); *In re Princeton Square*  
7 *Associates, L.P.*, 201 B.R. 90, 96 (Bank S.D.N.Y. 1996) (“The use of rents by a debtor in  
8 possession to maintain the property to the same extent that receiver of rents would use the rents  
9 does no economic harm to the lender … Adequate protection is required for the ‘use’ of the secured  
10 creditor’s collateral. In the context of rents, this court concludes that no monetary protection is  
11 required to be provided by the debtor in possession to the secured creditor to the extent that the  
12 rents are applied for the maintenance of the property in the manner a receiver would apply the  
13 rents.”); *499 W. Warren Street Associates*, 142 B.R. at 56-57 (“Under appropriate circumstances,  
14 use of a portion of the rental income to pay the reasonable and necessary operating expenses of the  
15 property satisfies [the adequate protection requirement].”).

16 The Debtor’s proposed use of cash collateral will not endanger the value of Property  
17 claimed as collateral by the Lender. In fact, maintenance of the Property would only serve to  
18 protect the value of the property, and as a result, the Lender’s asserted interest. Therefore, the  
19 Lender is adequately protected and the Debtor should be permitted to use of the cash collateral  
20 from the Property to pay the expenses associated with maintaining, preserving and improving the  
21 Property.

22 Based on the foregoing, the Debtor respectfully requests that the Court enter its order  
23 authorizing the Debtor to use the Income to pay the Expenses in accordance with the Budget, with a  
24 ten percent (10%) variance, for the next seventy-two (60) days with the right to seek additional use  
25 of the Income after the expiration of such period. The Debtor requests that the court enter an order  
26 compelling the Debtor’s secured creditor to endorse the insurance check over to the Debtor to allow  
27 the Debtor to pay for the necessary repairs.

28

1 RESPECTFULLY SUBMITTED: November 19, 2010.

2 POLSINELLI SHUGHART PC

3 By:

4 John J. Hebert  
5 Mark W. Roth  
6 Philip R. Rudd  
7 CityScape Plaza  
One E. Washington, Suite 1200  
Phoenix, AZ 85004

8 *Attorneys for the Debtor*

9 **COPY** of the foregoing mailed (or served via  
10 electronic notification if indicated by an “\*”)  
on November 19, 2010, to:

11 U.S. TRUSTEE'S OFFICE  
12 \* [USTpRegion14.px.ecf@usdoj.gov](mailto:USTpRegion14.px.ecf@usdoj.gov)  
230 N. 1<sup>st</sup> Avenue, Suite 204  
Phoenix, AZ 85003

13 JON SAFFER  
Snell & Wilmer LLP  
One Arizona Center  
400 E. Van Buren  
Phoenix, AZ 85004  
14 *Attorneys for JPMCC 2007-CIBC19 Shea  
Boulevard, LLC*

15 List of Twenty Largest Unsecured Creditors  
16 attached hereto

17 By: /s/ Mary Engel

Caviness Construction, Inc.  
12633 North Cave Creek Road  
No. 3  
Phoenix, AZ 85022

Division Nine Contracting, Inc.  
4047 E. Superior Avenue  
Phoenix, AZ 85040-1750

Gallagher & Kennedy PA  
2575 East Camelback Road  
Phoenix, AZ 85016

Levrose Real Estaet  
4414 N. Civic Center Plaza  
Suite 100  
Scottsdale, AZ 85251

PHArchitecture  
15849 N. 71<sup>st</sup> Street  
Scottsdale, AZ 85254

S&S Paving  
3401 E. Illini St.  
Phoenix, AZ 85040

Summit Tax Consulting  
10278 E. Hillery Dr.  
Scottsdale, AZ 85255

Cindy Hammond  
Churchill Commercial Capital  
1811 North Tatum Blvd., #3083  
Phoenix, AZ 85028

E Staff  
1803 North Palm Drive  
Tempe, AZ 85281

Hunter Engineering  
10450 N. 74<sup>th</sup> Street  
Suite 200  
Scottsdale, AZ 85258

McCormick Ranch POA, Inc.  
9248 N. 94<sup>th</sup> St.  
Scottsdale, AZ 85258

Randall Cohen, MD  
9325 E. Shea Boulevard  
Bldg. A  
Scottsdale, AZ 85260

Speedy Gonzales Construction  
6802 W. Frier Dr.  
Glendale, AZ 85303-1333

Wye Electric  
1950 W. Rose Garden Lane  
Phoenix, AZ 85027-2748

CJS Enterprises, LLC  
22023 N. 20<sup>th</sup> Ave.  
Suite B  
Phoenix, AZ 85027

Freedom Glass  
3625 E. Atlanta Avenue  
Suite 1  
Phoenix, AZ 85040-2917

Lake & Cobb  
1095 W. Rio Salado Parkway  
Suite 206  
Tempe, AZ 85281

Michael P. Leary  
10278 E. Hillary Drive  
Scottsdale, AZ 85255-8906

S&H Steel  
620 West Commerce Avenue  
Gilbert, AZ 85233-4300

Stoops, Denious, Wilson &  
Murray  
350 E. Virginia Ave.  
Phoenix, AZ 85004